IN THE MATTER OF ARBITRATION BETWEEN

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City of West St. Paul,
Employer,

DECISION AND AWARD

and

BMS CASE NO. 06-PA-645

Law Enforcement Labor
Services, Inc.,
Union.
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ARBITRATOR:	Stephen A. Bard
DATE OF HEARING:	June 19, 2006
PLACE OF HEARING:	West St. Paul City Hall
DATE OF MAILING OF POST-HEARING BRIEFS:	August 4, 2006
DATE OF DECISION AND AWARD:	August 21, 2006
GRIEVANTS:	Ann Kane and Debra Garrison

APPEARANCES:

For the Employer:

Mr. Cyrus F. Smythe
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For the Union:

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INTRODUCTION

This matter came on for arbitration before Neutral Arbitrator Stephen A. Bard, on June 19, 2006, at 9:00 a.m. in West St. Paul, Minnesota. The Employer was present with its witnesses and was represented by Mr. Cyrus F. Smythe of Labor Relations Associates. The Union was present with its witnesses and was represented by Ms. Marylee Abrams, General Counsel, Law Enforcement Labor Services, Inc.

Testimony and exhibits were taken at the time of the hearing and at the conclusion thereof the parties agreed to simultaneously serve and submit briefs on August 4, 2006.

ISSUES

1. Did the Employer violate the Collective Bargaining Agreement when it terminated the employment of the grievants?

2. If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

The following provisions of the Collective Bargaining Agreement are relevant to a decision of this case.

ARTICLE V.
EMPLOYER AUTHORITY

5.1 The EMPLOYER retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct, and determine the number of personnel; to establish work schedules, and to perform any inherent managerial function not specifically limited by this AGREEMENT.

5.2 Any term and condition of employment not specifically established or modified by this AGREEMENT shall remain solely within the discretion of the EMPLOYER to modify, establish, or eliminate.

ARTICLE XI
WORK SCHEDULE

11.3 Nothing contained in this or any other Article shall be interpreted to be a guarantee of a minimum or maximum number of hours the EMPLOYER may assign employees.

ARTICLE XVI
SICK LEAVE AND SEVERANCE PAY

Sick Leave and severance pay will be granted in accordance with the most current West St. Paul Personnel Policy adopted by the West St. Paul City Council.

ARTICLE XIX
WAIVER

19.2 The parties mutually acknowledge that during the negotiations which resulted in this AGREEMENT, each had the unlimited right and opportunity to make demands and proposals with respect to any term or condition of employment not removed by law from bargaining. All agreements and understandings arrived at by the parties are set forth in writing in this AGREEMENT for the stipulated duration of this AGREEMENT. The EMPLOYER and the UNION each voluntarily and unqualifiedly waives the right to meet and negotiate regarding any and all terms and conditions of employment referred to or covered in this AGREEMENT or with respect to any term or condition of employment not specifically referred to or covered by this AGREEMENT, even though such terms or conditions may not have been within the knowledge or contemplation of either or both of the parties at the time this contract was negotiated or executed.

The following provisions of the West St. Paul Personnel Policy Manual are relevant to a decision of this case.

SECTION 9.0–<u>LEAVING/CHANGING CITY EMPLOYMENT</u>

9.1 <u>LAY-OFF</u>

The City may lay off a full-time employee whenever such action is necessary due to budgetary reasons, reduced workload, or to the discontinuance of a position. Full-

time and part-time employees who are laid off from employment shall be provided with a minimum of sixty (60) days advance notice of such lay-off if possible. Temporary employees may be separated from employment without advance notice.

The following provision of the Minnesota Statutes is relevant to a decision of this case.

179A.07 Rights and obligations of employers.

Subdivision 1. **Inherent managerial policy.** A public employer is not required to meet and negotiate on matters of inherent managerial policy. Matters of inherent managerial policy include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, selection of personnel, and direction and the number of personnel. No public employer shall sign an agreement which limits its right to select persons to serve as supervisory employees or state managers under section 43A18, subdivision 3, or requires the use of seniority in their selection.

FINDINGS OF FACT

The Arbitrator finds that the following facts are either not in dispute or have been established by a fair preponderance of the evidence by the party having the burden of proof.

1. The parties had a negotiated labor contract ("CBA") which expired December 31, 2005. Commencing as early as September 2004, there were discussions between the City and Dakota County about moving dispatch services to a joint dispatch center operated by Dakota County. This was being considered for budgetary reasons and the possibility of doing this as well as the mechanics and timing of the change were studied by City officials during the summer and fall of 2005.

- Initially City Dispatchers were lead to believe the West St. Paul dispatch center would close December 31, 2005 at the expiration of the then current Collective Bargaining Agreement. However, as time went on that decision changed. The City Dispatchers were initially offered full time jobs with Dakota County. However, for various reasons none of them accepted.

The pending closure of the West St. Paul dispatch center lead several dispatchers to either retire or obtain other employment. This left the dispatch center running with three dispatchers and Dispatchers were promised incentive pay of $500.00 per month if they stayed until the formal closing of the dispatch center. This was not negotiated with the Union. Grievant Debra Garrison received $1,500.00 in late November for three months of incentive pay. According to her testimony, the receipt of this money caused her ultimately to lose eligibility for unemployment compensation insurance until December 8, 2005. It is unclear from the record, therefore, whether or not and to what extent she benefitted from this payment. Grievant Ann Kane also received $1,500.00 in incentive pay but offered no testimony as to how, if at all, her unemployment benefits were affected.

3. For budgetary and other reasons having to do with implementation, the City finally

entered into a "Joint Powers Agreement" with Dakota County and other cities in Dakota County consolidating the provision of dispatch services into one dispatch center operated by the County. This was entered into pursuant to the provisions of Minnesota Statute §471.59 (the "Joint Powers Act") which authorizes such agreements between public employers. The dispatch function was transferred to the County on November 1, 2005 rather than on January 6, 2006 as originally planned.

4. On October 17, 2005, three dispatchers were notified that the dispatch center would

close on October 31, 2005, and dispatch duties would be transferred to Dakota County on November 1. In essence they were provided two weeks notice their jobs were ending. LELS filed a

grievance on behalf of dispatchers Debra Garrison and Ann Kane for all pay and benefits from November 1, 2005 through December 31, 2005 and such other relief as the arbitrator may deem appropriate.

POSITION OF THE UNION

The arguments of the Union in support of the grievance can be summarized as follows:

2. The City's Actions Violated the Labor Agreement and Constitute Subcontracting.

While the CBA was in effect any party who sought to alter or amend the terms and conditions of employment was under a duty to negotiate. The City retains all of its inherent managerial rights as set forth in Article V, but where the unilateral decisions of the City lead to an impact on the terms and conditions of the Union contract, such decisions are subject to negotiation and arbitration. By closing the Dispatcher unit prior to the expiration of the contract, and contracting for the same work with Dakota County without negotiating with the Union over its implementation, the City of West St. Paul violated the labor agreement and committed an unfair labor practice. Contracting outside the bargaining unit and hiring employees to perform LELS dispatchers bargaining unit work affects the very nature of the agreement and its terms and conditions and are subject to mandatory negotiation under PELRA. Whether or not an employee's job will be terminated so that the same function can be performed by a non_unit employee is a subject contemplated for negotiation as a term and condition of employment. The work to be performed by Dakota County is the same work

taken away from the LELS dispatchers. While the City retains the right to do this, it must negotiate with LELS over terms and conditions of employment, and the impact of the decision to close the dispatch center.

2. The Policy Manual Provided by the City of West St. Paul is a Part of the Collective Bargaining Agreement and Must be Enforced.

The policy manual provided to all City of West St. Paul employees upon hire was not merely a general statement of the City's policies. Instead, this policy manual was a specific delineation of Employer and Employee rights, duties, and obligations. Employer/Employee dependence on the policy is also evidenced by the explicit reference to the "West St. Paul Personnel Policy adopted by the West St. Paul City Council" in the current labor agreement regarding the severance pay provision (Current Labor Agreement Art. XVI), as well as the use and reliance on this policy by both Employer and Employee throughout the parties course of dealings.

Both the City and the dispatchers relied on the policy manual and the terms it contained.

The policies in an employee hand book may become part of the employees' original employment contract or part of the employment contract as modified by the parties. All of the legal prerequisites to finding that the handbook was part of the contract exist in this case. The policy of giving 60 days notice in the case of a layoff has become a part of the terms and conditions of employment not only because it was relied upon by the employer and employee, but also because it is expressly

referenced and incorporated into the labor agreement. Section 9 of the policy is not separate and distinct from the labor agreement between the City of West St. Paul and the dispatchers; it is one and the same. Because the City has violated the terms of the policy it has also violated the terms of the labor agreement.

- The City of West St. Paul Laid Off Members of the Dispatcher Unit.

The City denies the dispatchers were laid off, however, it offers no alternative theory to explain its actions. The City reserves the right to layoff, terminate, suspend, and discipline employees. This right is part and parcel of their inherent managerial rights guaranteed in the labor agreement, and this issue is not in dispute. The deviation from the policy and the labor agreement is the issue in the present case.

A layoff is the "termination of employment at the employer's instigation." As is frequently the case, this layoff was done for business reasons and bore no relation to the employee's actual work performance. On July 13, 2005 the dispatchers were notified they had a right to Dislocated Worker Program (DWP) assistance. They were told the DWP "came into existence 14 years ago as a result of increasing *layoffs* nationwide." The City's actions can only be characterized as a layoff when it repeatedly refers to it as one, helped obtain state benefits available for laid off employees for the dispatchers, and closed down an entire unit only to have the work performed by an outside agency. Because this was a layoff the City owed the dispatchers sixty days notice as required in the policy adopted by the City

Council.

4. The Actions of the City of West St. Paul Undermine the Purpose and Effect of the Labor Agreement. The purpose of the labor agreement between LELS and the City was to establish procedures for the resolution of disputes concerning the agreement, and place in written form the parties' agreement upon terms and conditions of employment for the duration of the agreement. The City's failure to adhere to the contractual terms and conditions of employment is a violation of the very purpose of the labor agreement, and has weakened the bargaining unit.

POSITION OF THE EMPLOYER

The Employer's arguments in defense of its actions are summarized as follows:

- The consolidation of the City's dispatch function by the signing of the Joint Powers Agreement with Dakota County "is not considered subcontracting by law or arbitration decisions and are protected from the obligation to negotiate by M.S. 179A.07, Subd. 1.
- The Union argues that for the duration of the length of a collective bargaining agreement the employment of all members of the bargaining unit is protected. This is a flawed argument. It has no basis in law or in this CBA.
- The City had the absolute contractual and legal right to enter into the Joint Powers Agreement and to terminate the dispatcher function. This CBA expressly states that no minimum hours are guaranteed. The "zipper clause (Article 19.2) further precludes the Union's argument.

DISCUSSION

Most of the City's arguments in this case are designed to refute arguments that the Union is not raising. The City emphasizes that it has the right to terminate the dispatcher position under the Management Rights provision of the CBA. It clearly does have that right and the Union is not disputing it. The City argues that it was legally entitled to enter into the Joint Powers Agreement with Dakota County. It clearly does have that right and the Union concedes the point. The City argues that the CBA does not guarantee employment or minimum hours. The Union does not disagree. The following issues are, however, in serious dispute.

Was there a duty to bargain?

The Union argues that what the City did here was a prohibited subcontracting out of bargaining unit work which affected a term and condition of employment without good faith bargaining with the Union. The City counters with the proposition that when it terminates a position by entering into a Joint Powers Agreement, this "is not considered subcontracting by law or arbitration decisions and [public employers] are protected from the obligation to negotiate by M.S. 179A.07, Subd. 1." Unfortunately for its case, the City offers no authority for that statement and this Arbitrator, after extensive research, can find none.

The Joint Powers Act, Minnesota Statutes §471.59 *et seq* is completely silent on the subject. It simply does not deal with the effect of such an agreement on a public employer's obligations under PELRA. It cannot simply be presumed that because the legislature has conferred on political subdivisions the right to enter into such agreements that it simultaneously relieved them of their bargaining obligations under PELRA when, as here, the effect of the agreement is clearly to effect the terms and conditions of employment under a CBA. Also, the Arbitrator has found no case law

or arbitral precedent on this precise point and the parties have cited none. It appears, therefore, that this is a case of first impression on this issue.

The effect on the members of this bargaining unit of transferring the dispatch function to Dakota County pursuant to a Joint Powers Agreement is precisely the same as subcontracting to a private employer. In both cases their jobs are eliminated. In both cases the employer had the legal right to do so absent a prohibition against subcontracting in the CBA. The Arbitrator is unaware of any policy consideration which should make the employer's obligations to bargain in good faith different in the two cases.

There is ample authority that notwithstanding the language of Minn. Stat. 179A.07, Subd. 1, the impact and manner of implementation of a unilateral decision to contract out bargaining unit work are subject to mandatory negotiation under PELRA. See, e.g. Independent School District No. 88, 503 N.W.2d 104 (Minn. 1993); General Drivers Union Local 346 v. Independent School District No. 704, 283 N.W. 2d 524 (Minn. 1979). There is no factual dispute that there was no bargaining in the instant case.

The Arbitrator holds that as a matter of law the Employer was under a duty to bargain in good faith with the Union over the effect and implementation of its policy to transfer the dispatch function to Dakota County in a Joint Powers Agreement and that the Employer did not do so in this case. The Arbitrator believes the City acted under a good faith belief that it was not obligated to bargain but, nevertheless, is not excused from its obligations because it was mistaken in its belief.

Was this a layoff?

The City argues that these employees were not "laid off" since there jobs were eliminated as a result of the Joint Powers Agreement. This argument flows from the notion that the term "layoff"

is used in a narrow sense and is confined to situations in which an employee loses his or her job temporarily as a result of economic situations and is expected to be eventually recalled to work. As the Union quite correctly points out, this is not the dictionary meaning of the word nor is it the meaning the parties have given to it in other contexts. On this point the Arbitrator is particularly persuaded by Section 9.1 of the City's Personnel Manual, where one example of a "layoff" is given as "the discontinuance of a position."

The Arbitrator holds that when the dispatcher jobs were eliminated as a result of the Joint Powers Agreement that a "layoff" occurred within the meaning of the CBA and the City's Personnel Policy Manual.

Is the City Bound by the policies in its Personnel Manual?

The Arbitrator has concluded for all of the reasons cited by the Union that the City's Policy Personnel Manual has been incorporated into the CBA and is binding on the parties. No purpose would be served by a lengthy discussion of the elements of formation of unilateral contracts. Suffice it to say on this point that all of the necessary elements for the formation of a unilateral contract required by the Minnesota Court of Appeals were present in this case. Pine River State Bank v. Metille, 333 N.W.2d 290 (Minn. Ct. App. 1986).

Did the City violate the Contract in the manner in which it laid off the Grievants?

There is no factual dispute that the Grievants were only given two weeks notice that their jobs were being terminated. Section 9.1 of the Personnel Policy Manual, which is binding on the parties, requires sixty days notice "if possible." Such notice was certainly possible under all of the facts of this case. The Arbitrator finds that the City violated the Policy Manual and, consequently, the CBA by not giving the Grievants sixty days notice.

DECISION AND AWARD

For the above stated reasons the grievance is sustained. The grievants have demonstrated genuine economic loss as the result of not receiving the contractually mandated notice and of the City's failure to bargain with the Union over the implementation of the policy. In order to make them whole, they are each awarded full back pay and other benefits to which they may be entitled under the CBA for the period November 1, 2005 through December 31, 2005.

Respectfully Submitted

Stephen A. Bard, Arbitrator